

CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Planning and Economic Development

AGENDA DATE: Regular Agenda – October 26, 2010

CONTACT PERSON/PHONE: Kathryn Dodson, PhD, Director 541-4670

DISTRICT(S) AFFECTED: ALL

SUBJECT:

Discussion and action on a Resolution that the City Manager be authorized to execute a Chapter 380 Economic Development Program Agreement by and between the City of El Paso and The Boeing Company, a Delaware Corporation ("Applicant"), in relation to the Applicant's expansion or its manufacturing facility in El Paso, Texas. (All Districts)

[Planning and Economic Development, Kathryn Dodson (915)541-4670]

BACKGROUND/DISCUSSION:

The Boeing Company agrees to expand its manufacturing facility in El Paso, retain and/or create jobs and invest a minimum of \$5M. The 380 agreement will be funded by rebating a portion of future property taxes.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

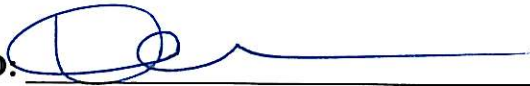
General Fund - 380 Agreement

BOARD/COMMISSION ACTION:

On February 25, 2010, the Economic and Community Development/Quality of Life and Tourism Legislative Review Committee approved taking this item to City Council.

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



Department Head

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to execute a Chapter 380 Economic Development Program Agreement by and between the City of El Paso and The Boeing Company, a Delaware Corporation ("Applicant"), in relation to the Applicant's expansion of its manufacturing facility in El Paso, Texas.

APPROVED AND ADOPTED this ____ day of _____ 2010.


CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

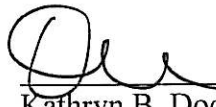
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Marie A. Taylor
Assistant City Attorney

APPROVED AS TO CONTENT:



Kathryn B. Dodson, Ph.D., Director
Economic Development Department

STATE OF TEXAS)
)
COUNTY OF EL PASO) **CHAPTER 380 ECONOMIC DEVELOPMENT
PROGRAM AGREEMENT**

This Chapter 380 Economic Development Program Agreement ("Agreement") is made and entered into by and between the **CITY OF EL PASO, TEXAS** ("City"), a Texas home rule municipal corporation, and **THE BOEING COMPANY** ("Applicant"), a Delaware Corporation, for the purposes and considerations stated below:

WHEREAS, the Applicant desires to enter into this Agreement pursuant to Chapter 380 of the Texas Local Government Code ("Chapter 380"); and

WHEREAS, the City desires to provide, pursuant to Chapter 380, an incentive to Applicant to expand the Manufacturing Facility as more fully described below; and

WHEREAS, the City has the authority under Chapter 380 to make loans or grants of public funds for the purposes of promoting local economic development and stimulating business and commercial activity within the City of El Paso; and

WHEREAS, the City determines that a grant of funds to Applicant will serve the public purpose of promoting local economic development and enhancing business and commercial activity within the City; and

WHEREAS, the City and Applicant desire that expansion of the Manufacturing Facility occur in the City of El Paso; and

WHEREAS, the expansion of the Manufacturing Facility will encourage increased economic development in the City, provide significant increases in the City's property tax revenues, and improve the City's ability to provide for the health, safety and welfare of the citizens of El Paso; and

WHEREAS, the City has concluded and hereby finds that this Agreement clearly promotes economic development in the City of El Paso and, as such, meets the requisites under Chapter 380 of the Texas Local Government Code and further, is in the best interests of the City and Applicant.

NOW, THEREFORE, in consideration of the mutual benefits and promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

SECTION 1. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement.

- A. **Agreement.** The word "Agreement" means this Chapter 380 Economic Development Program Agreement, together with all exhibits and schedules attached to this Agreement.
- B. **Applicant.** The word "Applicant" means **The Boeing Company**, a Delaware Corporation.
- C. **City.** The word "City" means the City of El Paso, Texas.
- D. **Development.** The word "Development" means the Manufacturing Facility as more fully described on Exhibit "A", which is attached hereto and incorporated herein for all purposes.
- E. **Full-Time Employment.** The words "Full-Time Employment" mean a job requiring a minimum of two thousand and eighty (2,080) hours of work averaged over a twelve (12) month period, including allowance for vacation and sick leave, with full company benefits, including company paid health insurance (Employee must not be required to pay more than fifty percent (50%) of the premium) with such jobs being located at the Development, within the City of El Paso, Texas. These requirements are more completely described in Exhibit "B", which is attached hereto and incorporated herein for all purposes.
- F. **Grant.** The word "Grant" means a payment on a yearly basis to Applicant under the terms of this Agreement computed with reference to property taxes generated by the Development and payable from the City's general revenue fund.
- G. **Grant Submittal Package.** The words "Grant Submittal Package" mean the documentation required to be supplied to City on a yearly basis as a condition of receipt of any Grant, with such documentation more fully described in Exhibit "C", which is attached hereto and incorporated herein for all purposes.
- H. **Qualified Expenditures.** The words "Qualified Expenditures" means those costs incurred by Applicant in the acquisition, construction or furnishing of the Development.
- I. **Tax Increment.** The words "Tax Increment" mean the increased value of the taxes paid on the real and personal property over the value of the base year, which is hereby established as 2010, the year in which this Agreement is executed.

SECTION 2. TERM AND GRANT PERIOD.

The term of this Agreement shall be seven (7) years from the Effective Date of this Agreement. The Effective Date of this Agreement shall be the date upon which both parties have fully executed this Agreement, as noted below. However, the Applicant's eligibility for Grant payments shall be limited to five (5) consecutive years (the "Grant Period") within the term of this Agreement. The Grant Period shall begin with the first year being the first tax year that begins after: (i) the Applicant having met all Full Time Employment job requirements noted in Exhibit "B", which is attached hereto and incorporated herein for all purposes and (ii) the Applicant having made all Qualified Expenditures. Failure of the Applicant to make Qualified Expenditures and meet its Full Time Employment job requirements within two (2) years of the Effective Date of this

Agreement shall result in the immediate termination of this Agreement. The City shall review Applicant's eligibility for Grant Payments on an annual basis during the Grant Period.

SECTION 3. OBLIGATIONS OF APPLICANT.

During the term of this Agreement, Applicant shall comply with the following terms and conditions:

- A. Applicant agrees that it shall make Qualified Expenditures of not less than Five Million Dollars (\$5,000,000.00) in the Development. The City shall be permitted to review Applicant's receipts of Qualified Expenditures to evidence the expenditure of a minimum amount of Five Million Dollars (\$5,000,000.00).
- B. Applicant agrees that it shall retain, create, staff, and maintain the Full-Time Employment positions described in Exhibit "B" for the Development as soon as reasonably possible from the Effective Date of this Agreement, and shall maintain the Full-Time Employment positions for the Development through the entire Grant Period of this Agreement. Applicant shall maintain the Full-Time Employment positions for each quarter of each fiscal year with the total per day hours worked averaged over each fiscal quarter.

Applicant shall provide the City with an annual report by April 30th of each year during the term of this Agreement, certifying the status of compliance through the preceding year. Such annual report shall include the number of new jobs created and retained for the Development, information on any new investments in the Development, and any other information relevant to the Development and the City's economic development goals. Documentation for jobs may be in the form of quarterly IRS 941 returns, Texas Workforce Commission Employer Quarterly Reports, or employee rosters that show the hours worked and the positions filled. Applicant shall also provide the City with such other reports as may reasonably be required.

Applicant, during normal business hours, at its principal place of business in El Paso, shall allow the City or its agents reasonable access to Applicant's employment records and books, and other records that are related to the economic development considerations and incentives described herein, to verify employment records and any other records related to the City's economic development considerations and incentives provided herein. The confidentiality of such records will be maintained in accordance with and subject to all applicable laws.

- C. Unless otherwise agreed by the City and Applicant, each Grant Submittal Package shall be in the form provided in Exhibit "C". If Applicant fails to timely submit a Grant Submittal Package for a particular year, the City may give Applicant written notice of its failure to timely submit such Grant Submittal Package, and Applicant shall have thirty (30) calendar days from the date on which such written notice is given in which to submit such Grant Submittal Package. The City's determination of the amount of the Grant

payment due to Applicant is final; provided, however, that the Applicant may appeal to the City Council within thirty (30) days of payment. The City Council shall hear the appeal within thirty (30) days of request for appeal and the City Council's determination of the amount of the Grant payment shall be final. Nothing herein shall limit (or be construed to limit) Applicant's rights and remedies as described in Section 5 of this Agreement.

- D. Applicant shall pay or cause to be paid by January 31 of each year all of the real and business personal ad valorem taxes due for the previous tax year on the Development and any other property within the City of El Paso. The parties to this Agreement agree that the taxable value of the Development, after completion of all construction and improvements, will have a minimum base value of Five Million Dollars (\$5,000,000.00). Applicant shall have the right to contest the appraised value of the Development as provided by law. However, Applicant covenants and agrees that during the term of this Agreement it shall not challenge or permit anyone else to take actions on its behalf to challenge any assessments by the Central Appraisal District at \$5,000,000.00 or lower. It is the intent of the parties that the assessed value of the Development on the tax rolls shall have a minimum base value of \$5,000,000.00 during the term of this Agreement and any affirmative act by Applicant to reduce the assessed value to amount below \$5,000,000.00 will be deemed an event of default that will result in termination of this Agreement.

SECTION 4. OBLIGATIONS OF CITY.

During the term of this Agreement and so long as an event of default has not occurred and is continuing as set forth herein (provided, however, an event of default hereunder shall not be deemed to have occurred until after the expiration of the applicable notice and cure period), City shall comply with the following terms and conditions:

- A. The City agrees to process any Grant Payments to Applicant within ninety (90) days after its approval of the Applicant's Grant Submittal Package.
- B. Pursuant to the City's "Incentives Policy – Guidelines and Criteria" and a cost/benefit calculation completed solely by and at the City's discretion, the City shall determine the total amount of Grant Payments due to the Applicant, if any, on an annual basis. The minimum amount of the Grant Payment the Applicant shall be eligible for each year shall be as set forth in Exhibit "B".

SECTION 5. EVENTS OF DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement:

- A. **Failure to Maintain Development and Job Requirements.** Applicant's failure or refusal to operate the Development and maintain required Full Time Employment pursuant to this Agreement through the entire Grant Period of this Agreement, and Applicant's failure or

refusal to cure within thirty (30) days after written notice from the City describing such failure, shall be deemed an event of default. However, if such failure cannot be cured within such thirty (30) day period in the exercise of all due diligence, but the Applicant has not yet commenced such cure within such thirty (30) day period or fails to continuously thereafter diligently prosecute the cure of such failure, such actions or omissions shall also be deemed an event of default.

- B. **False Statements.** In the event the Applicant provides any written warranty, representation or statement under this Agreement or any document(s) related hereto that is/are false or misleading in any material respect, either now or at the time made or furnished, and Applicant fails to cure same within thirty (30) days after written notice from the City describing the violation shall be deemed an event of default. If such violation cannot be cured within such thirty (30) day period in the exercise of all due diligence, and Applicant fails to commence such cure within such thirty (30) day period or fails to continuously thereafter diligently prosecute the cure of such violation, such actions or omissions shall also be deemed an event of default. Further, if Applicant obtains actual knowledge that any previously provided warranty, representation or statement has become false or misleading after the time that it was made, and Applicant fails to provide written notice to the City of the false or misleading nature of such warranty, representation or statement within ten (10) days after Applicant learns of its false or misleading nature, such action or omission shall be deemed an event of default. In the event this Agreement is terminated pursuant to this Section, all Grant Payments previously provided by the City pursuant to this Agreement shall be recaptured and repaid by Applicant within sixty (60) days from the date of such termination.
- C. **Insolvency.** The dissolution or termination of Applicant's existence as a going business or concern, Applicant's insolvency, appointment of receiver for any part of Applicant's portion of the Property, any assignment of all or substantially all of the assets of Applicant for the benefit of creditors of Applicant, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Applicant shall all be deemed events of default. However, in the case of involuntary proceedings, if such proceedings are discharged within sixty (60) days after filing, no event of default shall be deemed to have occurred.
- D. **Improvements to the Development.** Applicant's failure to comply with its improvement obligations set forth in this Agreement and Applicant's failure to cure same within thirty (30) days after written notice from the City shall be deemed an event of default. If such failure cannot be cured within such thirty (30) day period in the exercise of all due diligence but Applicant fails or refuses to commence such cure within such thirty (30) day period or fails or refuses to continuously thereafter diligently prosecute such cure, except to the extent such failure is caused by any act or failure to act on the part of the City, such actions or omissions shall be deemed events of default.
- E. **Property Taxes.** In the event Applicant allows any property taxes owed to the City to become delinquent and fails to timely and properly follow the legal procedures for protest and/or contest of such taxes and to cure such failure or post a satisfactory bond within thirty

(30) days after written notice thereof from the City and/or El Paso Central Appraisal District, such actions or omissions shall be deemed an event of default. Subject to the restrictions noted herein, Applicant shall have the right to contest the appraised value of the Development.

- F. **Other Defaults.** Failure of Applicant or City to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any related documents, and Applicant or City fails to cure such failure within thirty (30) days after written notice from the other party describing such failure shall be deemed an event of default. If such failure cannot be cured within such thirty (30) day period in the exercise of all due diligence, but if Applicant or City also fails or refuses to commence such cure within such thirty (30) day period or fails or refuses to continuously thereafter diligently prosecute the cure of such failure, such act or omission shall be deemed an event of default.
- G. **Failure to Cure.** If any event of default by Applicant shall occur, and after Applicant fails to cure same in accordance herewith, then this Agreement is terminated without any further action required of the City and the City's obligations end at that time. If a default has not been cured within the time frame stated herein, the non-defaulting party shall have all rights and remedies under the law or in equity.

SECTION 6. TERMINATION OF AGREEMENT BY CITY WITHOUT DEFAULT OF APPLICANT.

The City may terminate this Agreement for its convenience and without the requirement of an event of default by Applicant, which shall become effective immediately if any state or federal statute, regulation, case law, or other law renders this Agreement ineffectual, impractical or illegal, including any case law holding that a Chapter 380 Economic Development Agreement such as this Agreement is an unconstitutional debt.

SECTION 7. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- A. **Amendments.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by both parties.
- B. **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in El Paso County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of El Paso County, Texas.
- C. **Assignment of Applicant's Rights.** Applicant understands and agrees that the City expressly prohibits Applicant from selling, transferring, assigning or conveying in any

way any rights to receive the Grant proceeds without the City's prior written consent. Any such attempt to sell, transfer, assign or convey without the City's prior written consent shall result in the immediate termination of this Agreement, with no ability for the Applicant to cure.

- D. **Applicant's Sale or Transfer of the Development.** Prior to any sale or other transfer of ownership rights in the Development, Applicant shall notify the City in writing of such sale or transfer within thirty (30) business days of the effectiveness of such sale or transfer. This provision is a material term of this Agreement and the failure to notify the City of such sale or transfer within the applicable period shall constitute an event of default.
- E. **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. City warrants and represents that the individual executing this Agreement on behalf of City has full authority to execute this Agreement and bind City to the same. The individual executing this Agreement on Applicant's behalf warrants and represents that he or she has full authority to execute this Agreement and bind Applicant to the same.
- F. **Completion of Development.** As consideration for the agreements of the City as contained herein, Applicant agrees that it will diligently and faithfully in a good and workmanlike manner pursue the completion of the Development and that the construction of same will be in accordance with all applicable federal, state and local laws and regulations.
- G. **Confidentiality Obligations.** The confidentiality of such records employment records and any other records related to the City's economic development considerations and incentives provided herein will be maintained in accordance with and subject to all applicable laws, including the Public Information Act, Chapter 552, Texas Government Code. Specifically, the City will maintain the confidentiality of any proprietary information to the extent permitted by law and agrees that, as required by the Public Information Act, it will notify Applicant if a request relating to such proprietary information is received. Applicant represents that it understands that the Public Information Act excepts disclosure of trade secret and confidential commercial information and that it will need to assert the proprietary interest of Applicant as a basis for nondisclosure.
- H. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- I. **Employment of Undocumented Workers.** During the term of this Agreement, Applicant agrees not to knowingly employ any undocumented workers as defined in Texas Government Code Section 2264.001. If convicted of a violation under 8 U.S.C. Section 1324a(f), Applicant shall repay the amount of the Grant payments received by Applicant from the City as of the date of such violation not later than one hundred twenty

(120) days after the date Applicant is notified by City of a violation of this section, plus interest from the date the Grant payment(s) was paid to Applicant, at the rate of seven percent (7%) per annum. The interest will accrue from the date the Grant payment(s) were paid to Applicant until the date the reimbursement payments are repaid to City. City may also recover court costs and reasonable attorney's fees incurred in an action to recover the Grant payment(s) subject to repayment under this section. Applicant is not liable for a violation by its subsidiary, affiliate, or franchisee, or by a person which whom Applicant contracts.

- J. **Execution of Agreement.** The El Paso City Council has authorized the City Manager to execute this Agreement on behalf of the City.
- K. **Filing.** The City shall file this Agreement in the deed records of El Paso County, Texas.
- L. **Force Majeure.** It is expressly understood and agreed by the parties to this Agreement that if the performance of any obligations hereunder is delayed by reason of war, civil commotion, acts of God, inclement weather, fire or other casualty, or court injunction, the party so obligated or permitted shall be excused from doing or performing the same during such period of delay, so that the time period applicable to such obligation or requirement shall be extended for a period of time equal to the period such party was delayed.
- M. **Notices.** All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or when deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the addresses shown below. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, each party agrees to keep the other informed at all times of its current address.

CITY: City of El Paso
 City Manager
 2 Civic Center Plaza
 El Paso, Texas 79901

Copy To: City of El Paso
 Economic Development Department Director
 2 Civic Center Plaza
 El Paso, Texas 79901

APPLICANT: Christopher Wolter, Assistant Treasurer
 The Boeing Company
 100 N. Riverside Plaza, Chicago IL 60606

- N. **Ordinance Applicability.** The signatories hereto shall be subject to all ordinances of the City, whether now existing or in the future arising; provided however no ordinance shall reduce or diminish the contractual obligations contained herein. This Agreement shall confer no vested rights on the Development unless specifically enumerated herein.
- O. **Severability.** In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.


(SIGNATURES BEGIN ON THE FOLLOWING PAGE)

IN WITNESS WHEREOF, the parties have executed this Agreement on this ____ day
of _____, 20__.

CITY OF EL PASO, TEXAS


Joyce A. Wilson
City Manager

APPROVED AS TO FORM:



Marie A. Taylor
Assistant City Attorney

APPROVED AS TO CONTENT:



Kathryn Dodson, Ph.D., Director
Economic Development Department

ACKNOWLEDGMENT

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____,
20__, by **Joyce A. Wilson**, as **City Manager** of the **City of El Paso, Texas (CITY)**.

Notary Public, State of Texas

My Commission Expires:

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

APPLICANT: The Boeing Company



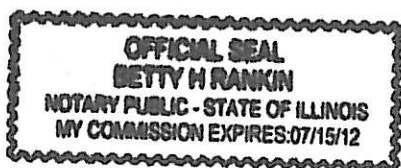
Name: Christopher Wolter

Title: Assistant Treasurer

ACKNOWLEDGMENT

STATE OF IL §
COUNTY OF COOK §

This instrument was acknowledged before me on the 28th day of September, 2010, by Christopher Wolter, as Assistant Treasurer of **The Boeing Company** (APPLICANT), on behalf of said entity.


Notary Public, State of ILLINOIS

My Commission Expires:

7/15/12

EXHIBIT A

The Manufacturing Facility located at 9566 Railroad Drive, El Paso, Texas

EXHIBIT B

[Employment Requirements & Grant Payment Eligibility]

SECTION 1. MINIMUM JOB CREATION AND RETENTION REQUIREMENTS.

In order to be eligible for any Grant Payments, Applicant is required to retain a minimum of two hundred and seventy two (272) full time jobs and create and maintain a minimum of one hundred and twenty one (121) new jobs that comply with the Full Time Employment requirements of the Agreement. Such minimum job requirements are to be created and maintained on site for the operations of the Development.

SECTION 2. ELIGIBILITY FOR GRANT PAYMENTS.

The Applicant's eligibility for Grant Payments and any subsequent Grant Payments made by the City to the Applicant shall be determined pursuant to and in accordance with the following:

- A. Grant Payments shall be made equivalent to at least **twenty-five percent (25%)** of the direct, indirect and induced taxes generated by the Development for the tax year covered by the Grant Submittal Package, upon Applicant's certification of at least **eighty percent (80%)** of the new jobs required herein for which wages are at or above **ninety percent (90%)** of the Median County Wage for the year covered by the Grant Submittal Package; or
- B. Grant Payments shall be made equivalent to at least **fifty percent (50%)** of the direct, indirect and induced taxes generated by the Development for the tax year covered by the Grant Submittal Package, upon Applicant's certification of at least **ninety percent (90%)** of the new jobs required herein for which wages are at or above **ninety percent (90%)** of the Median County Wage for the year covered by the Grant Submittal Package.
- C. The total of all grant payments in any given year may not exceed 100% of the tax increment.

SECTION 3. MEDIAN COUNTY WAGE.

For purposes of this Agreement, the Median County Wage is that wage established for the County of El Paso as adjusted on January 1 of each year. However, in no event shall the applicable Median County Wage used for determination of Grant Payment eligibility be less than the Median County Wage established for 2010, which is \$11.97 per hour.

EXHIBIT C

[Grant Submittal Package Form]

The Boeing Company believes that it has substantially met its obligations under the Chapter 380 Agreement dated the ____ day of _____, 20__ and signed by _____ of **The Boeing Company**. Pursuant to the Agreement, **The Boeing Company** submits this Grant Submittal Package Form in compliance with the Agreement and in anticipation of receiving the Grant payments referenced in the Agreement in consideration for its obligations met therein.

As required by the Agreement, the following information is submitted.

1. Job Certification Annual Report plus attachments (all attachments as referenced within the Agreement).
2. Property Tax Payment Receipt(s) of payment for tax year _____.

It is understood by **The Boeing Company** that the City of El Paso has up to ninety (90) days to process this request and reserves the right to deny the Grant claim if the terms of the Agreement have not been complied with.

The Boeing Company

Name: _____
Title: _____

ACKNOWLEDGMENT

STATE OF _____ §
COUNTY OF _____ §

This instrument was acknowledged before me on the ____ day of _____, 20__, by _____, as _____ of **The Boeing Company** (APPLICANT).

Notary Public, State of _____

My Commission Expires:
